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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 705

PIEDMONT FIRE INSURANCE COMPANY,
PETITIONER,

versus

HARRY J. AARON, MRS. D. E. ROLES, MRS. WALTER ROOKS, ET AL., RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

PIEDMONT FIRE INSURANCE COMPANY,
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IN THE

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No.

PIEDMONT FIRE INSURANCE COMPANY,
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versus

HARRY J. AARON, MRS. D. E. ROLES, MRS. WALTER ROOKS, ET AL., RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

May it Please the Court:

The Piedmont Fire Insurance Company, a corporation, prays that a writ of *certiorari* be issued to review a judgment of the United States Circuit Court of Appeals for the Fourth Circuit entered on the 8th day of November, 1943, in the civil action therein pending on

appeal from the United States District Court for the Eastern District of Virginia dismissing a Declaratory Judgment action instituted by it in the Newport News Division of said Court wherein Harry J. Aaron and Mrs. D. E. Roles, Mrs. Walter Rooks, and other parties similarly situated, numbering approximately nine hundred and thirty-four individuals, were sued as a class together with other defendants mentioned.

The petitioner respectfully shows to this Honorable Court:

A.

STATEMENT OF THE CASE.

I.

The Piedmont Fire Insurance Company is a corporation chartered and organized under the laws of North Carolina and a citizen of said State; Harry J. Aaron, Mrs. D. E. Roles, Mrs. Walter Rooks, and other parties similarly situated, who were made defendants as a class, the appellees herein, are respectively citizens of the State of Virginia.

II.

A certified copy of the entire record of said case in the said Circuit Court of Appeals is furnished and made a part hereof.

III.

OPINION BELOW.

The opinion of the Circuit Court of Appeals (Record 98) 138 Fed. (2) 732.

IV.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on the 8th day of November, 1943 (Record 101), rehearing denied January 10, 1944. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, etc. [U. S. C., Title 28, Section 347(a)]. See also Rules 38, *et seq.* as amended and existing.

V.

QUESTIONS PRESENTED.

(a) Whether a District Court of the United States after such has assumed and taken cognizance of a Declaratory Judgment proceeding instituted therein pursuant to Section 74(d) of the Judicial Code, as amended, U. S. C., Title 28, Section 24, as to the jurisdiction of such under the statute, no question had been raised by any defending litigant, and in which proceeding, answers had been filed going to the merits of the issues presented, the case pending upon the docket therein for eight (8) months during which time the litigants having been subjected to costs and delay incidently incurred and sustained exceeds its judicial discretion in dismissing such proceeding upon its own motion, over the objection of the plaintiff where there has been no hearing upon the merits of the case and the introduction of no new facts or circumstances tending to show that the complaint as originally filed did not present a case cognizable under the Declaratory Judgment Act.

(b) Whether it is not an abuse of discretion in a District Court to dismiss on its own motion a Declaratory Judgment suit brought under the Declaratory

Judgment Act [Jud. Code (3), 28 U. S. C. A., Section 400 (3)], or to give precedence in the hearing of such case, as provided under Rule 57 (Federal Rules of Civil Procedure) to a common law suit then upon the docket of such court originally brought by one of the defendants in a State Court against the plaintiff in the former action alone, which had been removed to the District Court by the plaintiff in the Declaratory Judgment proceeding upon the grounds of diversity of citizenship and there docketed, subsequent to the institution of the former suit, when there is nothing shown in the state of the pleadings or otherwise at the time of such dismissal that the rights of all litigants in both actions may not be fully protected under the pleadings in the Declaratory Judgment case.

(c) Whether a motion to dismiss a request for trial by jury in a Declaratory Judgment action brought under Section 274d (3) of the Judicial Code should not be sustained by the District Court where the issues presented in such, as disclosed by the pleadings, or otherwise shown, are solely equitable in their nature, i. e., such issues as were cognizable alone in a court of equity when the Seventh Amendment to the Constitution of the United States, providing for the right of trial by jury in certain suits at common law, was adopted?

(d) Whether it is permissible for a Circuit Court of Appeals, when considering on appeal the action of a District Court in dismissing a Declaratory Judgment action, to accept, consider and act upon certain alleged statements, not found in the record as certified from the District Court, brought to the attention of the appellate court through the means of an *ex parte* affidavit made by one of the parties to the cause and filed in the appellate court, or on the statement of counsel in a brief filed on behalf of such litigant, that the District Court had in arriving at its decision on the question involved in the

appeal, been influenced by a "factual situation" presented at a pre-trial hearing before such District Judge, when the record, as certified from the District Court, does not show that any pre-trial conference was held in such Court and the fact as to such having been held is not admitted but denied by opposing counsel in the Circuit Court of Appeals.

(e) Whether it is not obligatory under Rule 16 (F. R. C. P.), providing for procedure in pre-trial hearings, to preserve through an order of Court duly entered, or a stipulation of counsel taken at the time and made a part of the record, the actions taken before the Judge at such conference, and in the absence of such record being shown in the record of proceedings in the District Court as certified to such Circuit Court of Appeals, can the appellate Court accept and consider as facts so alleged to have been brought to the attention of the trial judge at an alleged pre-trial conference not so shown by the record to have been held.

(f) Whether, where in a Declaratory Judgment action instituted in a District Court by an insurance company seeking a declaration by the Court of its obligations under a binder issued by it under an insurance policy in which a large class of persons are severally interested as the beneficiaries thereunder, and such persons constituting a class so numerous as to make it impracticable for the plaintiff in such action to bring them all before the Court, and such are made parties defendant as a class in the manner provided by Rule 23 (F. R. C. P.), a District Court may enter an order dismissing such Declaratory Judgment suit, or such an order as effects a compromise of the rights of any of the litigants thereunder sued as a class without the consent of all parties to the cause or except in the manner provided under Rule 23 of Federal Rules of Civil Procedure.

VI.

THE PLEADINGS.

Civil Action No. 9.

The suit in which the decision sought to be reviewed was rendered was a consolidated cause pending in the District Court of the United States for the Eastern District of Virginia, Newport News Division, and therein designated as Civil Action No. 9 and Civil Action No. 16, the former, a Declaratory Judgment action instituted in the District Court on the 12th day of September, 1942, by the appellant against Harry J. Aaron and various other parties, including the appellees Mrs. D. E. Roles, Mrs. Walter Rooks and others, 934 persons in number, who were made defendants therein as a class, thirty-four (34) of whom being therein named upon whom process was served.

The object of the plaintiff being, as alleged in its petition, to secure a declaration by the Court of its rights, relations and legal liability, if any, to all parties interested in or entitled to benefits under the terms of a Furriers' Customers Insurance Policy, a binder securing the delivery of such having been issued by the appellant on June 15, 1942, upon the request of the appellee, Aaron, who had a dry goods store and merchant's business at Newport News, Virginia, and to whom the appellant had issued such binder upon the written request of an insurance broker and insurance agent on the day mentioned. Under the pleadings it is conceded that this broker was the agent of Aaron and that the insurance was applied for in a letter of the date mentioned to a local agent of the appellant at Newport News, Virginia, in which the binder was requested to be supplied by return mail. According to the allegations in the complaint, the binder had been procured through fraud, misrepresentation and concealment as to which both the appellee, Aaron, and his agent were cognizant, the details of which fraud and the circumstances which arose

in connection with the issuance of the binder are duly set out in the original complaint (Record 2).

It is averred in the complaint, and not denied in any defensive pleadings, that a fire of undisclosed origin occurred within three days of the placing of the insurance and that Aaron had in his store building at the time, held by him as bailee for hire, fur garments belonging to some nine hundred and more customers, to whom he had furnished warehouse or storage receipts, which garments had been injured or destroyed in the fire. Under the allegations in the petition and accompanying exhibits it is shown and claimed that each of the persons, made defendants as a class, hereinbefore mentioned, was or would be entitled to personal and individual protection under the terms of the Furriers' Customers Policy involved, and *furthermore that no property of the appellee, Aaron, was insured under the policy.* It is also averred under information and belief in the petition that there were other binders issued by other companies on the risk involved at the date of the fire. The petition carried the usual prayer for the granting of a Declaratory Judgment.

Answers to this petition were filed by sundry parties, including the appellee, Aaron, and the appellees, Mrs. D. E. Roles, Mrs. Walter Rooks, answering for themselves and others similarly situated as a class (Record 43).

The appellee, Aaron, filed a full and complete answer in the declaratory action. This answer was filed in the District Court on October 3, 1942 (Record 32), and before this defendant had even filed his initial pleading, the declaration in his common law action, *infra*, in the State Court, i. e., First October Rules (Record 7).

The answer denies fraud on the part of himself and his agent when seeking the binder for the insurance (Record 36). It admits that the Furriers' Customers Policy (Exhibit E) filed with plaintiff's petition in the

Declaratory Judgment action (Record 25) is the form of policy sought and that such "should now be issued", but he denies that his customers, the holders of his storage receipts, are interested in such policy, nor are such necessary or proper parties to the suit; that he has a valid and subsisting claim against the plaintiff therein, and avers that if the Court take jurisdiction of the cause, that he "may have" a jury trial on the issues involved.

Civil Action No. 16.

The second of the suits above mentioned was the common law action instituted in the State Court by the appellee, Aaron, in and for himself against the appellant on September 11th, 1942, when a memorandum was then filed returnable to the Third September Rules, under the State practice. The declaration was shown filed at the First October Rules (October 5th-8th, 1942), (Record 53). The cause matured upon the docket of the Court on October 19th, 1942, when it was, on that day, ordered to be removed to the United States District Court (Record 54).

The source and form of the declaration (Record 50) is of importance as it was this pleading which the District Court retained upon its docket as a master pleading to dispose of the litigation involved (Record 86).

The Court makes no provision under its order for the protection of those litigants who had been brought into court as a class under Rule 16 in the Declaratory Judgment proceeding, nor for the protection of the plaintiff as to such parties who hold an immediate right to sue such plaintiff under the insurance contract involved, and entitled so to do individually both under Rules of Civil Procedure for the District Courts of the United States, Rule 17, sub-section (b), and under the Virginia Statute, Section 5768 (See Appendix).

B.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

(1) In sustaining the ruling (Record 86) of the District Court in dismissing on its own motion the Declaratory Judgment proceeding brought under the Declaratory Judgment Act [Jud. Code (3), 28 U. S. C. A., Section 400 (3)] after such had once taken jurisdiction thereof, and in which the pleadings stated facts adequate and sufficient to give the Court under the provisions of the Act complete jurisdiction, both as to the subject matter involved and the parties thereto, the Circuit Court of Appeals committed error, and has decided a Federal question of prime importance affecting the usefulness of the Declaratory Judgment Act as a remedial form of procedure, contrary to the decisions of this Court, *viz*: *Aetna Ins. Co. of Hartford, Conn.* v. *Haworth, et al.*, 300 U. S. 227; *Altwater* v. *Freeman*, 219 U. S. ...., 87 L. Ed. 1035; and has rendered a decision in conflict with decisions of other Circuit Courts of Appeals on the same matter, *viz*: *Central Security Ins. Corp.* v. *Caswell, et al.* (5 C. C. A. 1937), 91 Fed. (2d) 607; *Gulley* v. *Interstate Nat. Gas Co.* (5 C. C. A. 1935), 82 Fed. (2d) 145; *Crosley Corp* v. *Hazeltine Corp.* (3 C. C. A. 1941), 122 Fed. (2d) 925 (*certiorari* denied, 315 U. S. 812). *Maryland Casualty Company* v. *United Corpn. of Massachusetts, et al.* (1 C. C. A. 1940), 111 Fed. (2d) 443; *Employers Liability Assur. Corp. Ltd.* v. *Ryan, et al.* (6 C. C. A. 1940), 109 Fed. (2d) 690; *Mississippi Power and Light Co.* v. *City of Jackson* (5 C. C. A. 1941), 116 Fed. (2d) 924; *Dominion Electric Manufacturing Co.* v. *Edwin L. Wiegand Co.* (6 C. C. A. 1942), 126 Fed. (2d) 172; *Carpenter, et al.* v. *Edmonson* (5 C. C. A. 1937), 92 Fed. (2d) 895; *Columbian Nat. Life Ins. Co.* v. *Foulke* (8 C. C. A. 1937), 89 Fed. (2d) 261; *Maryland Casualty Co.* v. *Consumers Finance Service* (3 C.

C. A. 1938), 101 Fed. (2d) 514; *American Auto Ins. Co.* v. *Freundt* (7. C. C. A. 1939), 103 Fed. (2) 613.

Furthermore such ruling is in conflict with the Federal Rules of Civil Procedure, *viz*: Rule 57.

(2) In sustaining the ruling of the District Court (Record 86) that such Court may take and assume jurisdiction in a declaratory judgment proceeding originating under the Declaratory Judgment Act [Jud. Code (3), 28 U. S. C. A., Section 400 (3)] in which there are many parties defendant, continue the same upon its docket for eight (8) months, during which period of time permitting numerous pleas to be filed directed to the merits of the case, order a consolidation of such action with a Civil Action at the time on the docket of such District Court, which had been removed from a State Court and placed upon the docket subsequent to the institution therein of the declaratory judgment proceeding, when the District Court of its own motion, and without adequate cause assigned, dismisses such declaratory judgment proceeding leaving the plaintiff in the declaratory judgment suit to seek such protection in the common law action mentioned as it may be permitted to make as a defendant therein in lieu of affording such plaintiff the relief as originally prayed in the former proceeding, the Circuit Court of Appeals in this instance has recognized and established a precedent in Federal practice detrimental to the interests of litigants in the Federal Court; and one which is contrary to the ruling of this Honorable Court in *Brillhart* v. *Excess Ins. Co.*, 316 U. S. 491-502.

(3) That the action of the Circuit Court of Appeals in accepting and adopting as a basis for its ruling in sustaining the action of the District Court in dismissing the declaratory judgment proceeding in this case (Record 86) certain alleged facts, alleged to have been

introduced in the District Court at a pre-trial hearing which were brought to the attention of the Circuit Court of Appeals in an *ex parte* affidavit made by one of the appellees and filed therein after the pending case had been therein docketed, and after the filing of the opening brief of counsel for the appellant; in which affidavit the attention of the Court is directed to alleged facts and circumstances which were not included directly or found through inference in the record as certified from the District Court, to the effect that the District Court when entering the order under review had had the facts in the affidavit related, namely, that settlements had been previously made with sundry parties defendant in the proceeding, and that this information, furnished at a pre-trial hearing, had influenced the District Judge in rendering the decision presented in the appeal and order, then under consideration by the Circuit Court of Appeals, while the record as certified from the District Court disclosed that no such pre-trial conference as alleged, as provided under Rule 16 (F. R. C. P.), was had in the District Court, it is here insisted that such course of procedure so adopted and followed by the Circuit Court of Appeals in this instance, in admitting and considering evidence so introduced, is contrary to the rule of practice prevailing generally in appellate courts, is contrary to the rule of practice prevailing in the Federal Courts, including this Honorable Court, except in the rare instances where the evidence so submitted, not included in the certified record, is directed to the jurisdiction of the Court to proceed in the matter before it on appeal. The ruling of the Circuit Court of Appeals in this instance goes further and appears to be in conflict with the *limitations* recognized in the following cases: *Kimball* v. *Kimball*, 174 U. S. 158, 43 L. Ed. 932; *California* v. *San Pablo, etc., R. Co.*, 149 U. S. 308, 37 L. Ed. 747; *Mills* v. *Green*, 159 U. S. 651, 40 L. Ed. 293; and *Dakota Co.* v. *Glidden*, 113 U. S. 262, 28 L. Ed. 981.

And such ruling is contrary to practice adopted and followed in other judicial circuits, namely, in the Ninth Judicial Circuit (see *Leonard* v. *Field*, 9 C. C. A., 71 Fed. (2d) 483.)

Moreover, such ruling is unfair to the litigant and contrary to public policy as exemplified in the present case.

(4) The action of the District Court, approved by the Circuit Court of Appeals, in dismissing the Declaratory Judgment action, taking as it did defendants thereto who were not parties to the cause retained upon its docket, was irregular from a procedural standpoint and unfair to the litigants concerned, as both the plaintiff and those defendants in such action who were then before the Court, having been made defendants under Rule 23 (F. R. C. P.), were entitled to an adjudication of their rights in the matter in controversy. The Court should have at least retained the cause upon its docket until both causes which had been consolidated by its order had been finally disposed of. *American Life Ins. Co.* v. *Stewart*, 300 U. S. 203-216, 81 L. Ed. 605.

(5) The action of the District Court (Record 86) approved by the Circuit Court of Appeals (Record 101) in dismissing the Declaratory Judgment proceeding then pending without taking cognizance of, and protecting under its decision the rights of the plaintiff and those defendants who were sued as a class under Rule 23, was clearly erroneous, and in conflict with the ruling of other Federal Courts of high standing. The Court could not under any recognized form of practice dismiss indirectly a group of litigants properly brought before it, through the dismissal of the suit in which they had been implicated; certainly both the rights of these litigants and the plaintiff in respect to such assumption of such rights should have been protected by the Court under the provisions of Rule 23 (R. F. C. P.), and such ac-

tion of the Circuit Court in so approving the action of the District Court in the premises is contrary to the ruling prevailing in other Federal Judicial Circuits, namely, the Fifth and Seventh, as exemplified in the following cases: *Century Ins. Co., Ltd.* v. *First Natl. Bank of Hugh Springs, Texas* (5 C. C. A. 1939), 102 Fed. (2d) 138; *Central States Grain Co-Op.* v. *Nashville Warehouse and Elevator Corp.* (7 C. C. A. 1931), 48 Fed. (2d) 138; and *Pacific Fire Ins. Co.* v. *Reiner, et al.*, 45 F. Supp. 702.

CONCLUSION.

Each of the questions presented is of grave importance. The very integrity of the jurisdiction of the Federal Courts is involved in the reasonable and fair application and interpretation by the Federal Courts of the present Rules of Civil Procedure, and particularly where the rules concern the administration in those courts where an election of forum may be had by the litigants between such courts and the State Court, and in cases where the issues presented between the age-old conflict between the Common Law and Equity Court are involved.

Moreover, there seems to be a conflict in the attitude of the courts in different Federal Judicial Circuits respecting the scope, or usefulness, of the Declaratory Judgment proceeding as reflected both in respect to the court assuming jurisdiction of such, and in the administration of the procedure involved where jurisdiction is

As to the questions here presented in the action of the Circuit Court of Appeals both in approving the action of the District Court in each of the several matters presented, and also in accepting and acting upon alleged facts not found in the record, it would seem particularly desirable that there should be a review of such questions of fundamental importance, in the public in

terest and that such questions be determined by this Honorable Court.

Wherefore, your petitioner prays that a writ of *certiorari* issue under the seal of this court, directed to the United States Circuit Court of Appeals for the Fourth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of said United States Circuit Court of Appeals in the case numbered and entitled on its docket No. 5108, civil, *Piedmont Fire Insurance Company, appellant,* v. *Harry J. Aaron, Mrs. D. E. Roles, Mrs. Walter Rooks, et al., appellees,* to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States, and that the judgment of said Circuit Court of Appeals be reversed by this court, and your petitioner prays that the certified copy of the record and proceedings of said United States Circuit Court of Appeals for the Fourth Circuit, filed with this petition, may be treated as a return to said writ of *certiorari,* and your petitioner prays that it may have such other and further remedies in the premises as to the court may seem appropriate and in conformity with law.

PIEDMONT FIRE INSURANCE COMPANY,
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